Supreme Court, U.S.
FILED
99 629 OCT 12 1999
OFFICE OF THE CLERK

No. 99-___

In The

Supreme Court of the United States

JOHN E. WHITE,

Petitioner,

v.

JANICE R. LaCHANCE, DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES R. KLIMASKI*
LAW OFFICES OF KLIMASKI, P.C.
1899 L Street NW
Suite 1250
Washington, DC 20036-3805
202-296-5600

RICHARD S. SEGERBLOM
704 South 9th Street
Las Vegas, NV 89101
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

27RY

QUESTIONS PRESENTED

Did the Federal Circuit err in holding the Whistleblower Protection Act, Pub. L. No. 101-12, 103 Stat. 16, and 5 U.S.C. § 2302(b)(8), forbidding adverse personnel actions against a federal employee who exposes non-confidential information he "reasonably believes" constitutes gross mismanagement, requires:

1. an objective standard comparing the employee's reasonable belief to that of a "disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee"; and,

2. the burden of proof on the Whistleblower to rebut a mandatory presumption " . . . that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations . . . " by "irrefragable[1] proof"; and,

3. thereby, *sub silentio*, requires the employee prove the mismanagement itself, which thwarts the Whistleblower Protection Act's intent to safeguard the employee?

---

[1] "Irrefragable" – not able to be refuted or disrupted. *Encarta World English Dictionary* at 950 (St. Martin's Press, 1999).

PARTIES TO THE PROCEEDINGS

The parties to this Petition are:

Petitioner John E. White.

Respondent Janice R. LaChance, Director, Office of Personnel Management.

Both were parties to the proceeding in the United States Court of Appeals for the Federal Circuit.

Petitioner believes that the Merit Systems Protection Board – co-Respondent below – takes no position on this Petition.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 7

I. The Federal Circuit Court's "Disinterested Observer" Test To Evaluate The Employee's Belief In The Disclosure's Truth Runs Contrary To Precedent And Presents An Important Question Of Federal Law 7

II. Because The Federal Circuit Court Decision Deviates From Settled WPA Precedent, This Court Must Exercise Its Supervisory Powers ... 10

III. The Question Presented In This Case Is An Important One Necessitating Supreme Court Review 12

CONCLUSION 13

APPENDIX

Opinion of the U.S. Court of Appeals for the Federal Circuit, *LaChance v. White*, No. 98-3249 (May 14, 1999) .....App. 1

Order of the U.S. Court of Appeals for the Federal Circuit denying petition for rehearing, *LaChance v. White*, No. 98-3249 (July 16, 1999) .....App. 10

TABLE OF AUTHORITIES

Page

CASES

Bump v. Dept. of Interior, 69 M.S.P.R. 254 (1998)..... 11

Clark v. Department of the Army, 997 F.2d 1466 (Fed. Cir. 1993) 10

Frederick v. Department of Justice, 73 F.3d 349 (Fed. Cir. 1996) 8, 10

Geyer v. Dept. of Justice, 63 M.S.P.R. 13 (1994)..... 8

Horton v. Department of Justice, 66 F.3d 279 (Fed. Cir. 1995) 10

Marano v. Department of Justice, 2 F.3d 1137 (Fed. Cir. 1993) 10

Ramos v. F.A.A., 4 M.S.P.R. 388 (1980) 8

Schlosser v. Department of Interior, 75 M.S.P.R. 15 (1997) 9

Special Counsel v. Starrett, 28 M.S.P.R. 60 (1985)..... 11

Warren v. Department of Army, 804 F.2d 654 (Fed. Cir. 1986) 10

Weber v. Department of the Army, 9 F.3d 97 (Fed. Cir. 1993) 10

STATUTES

Whistleblower Protection Act, Pub. L. No. 101-12, 103 Stat. 16 (1989).....2, 7

5 U.S.C. Sec. 2302(b)(8) 2, 7, 9

OTHER AUTHORITIES

S. Rep. No. 969, 95th Cong., 2nd Sess. 8 (1978) 9

S. Rep. No. 413, 100th Cong., 2nd Sess. (1988) 10

PETITION FOR WRIT OF CERTIORARI

John E. White respectfully petitions for a Writ of Certiorari to reverse the judgment below of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Federal Circuit's opinion is certified for publication, but not yet reported. (Appendix 1). The Federal Circuit's order denying the Petition for Rehearing is unpublished. (Appendix 10).

Related opinions in this case include:

(1) *King v. White and Merit Systems Protection Board,* Federal Circuit Miscellaneous Docket Nos. 97-M489 and 97-3242, concerning intervention rights of the Office of Personnel Management (unpublished);

(2) Final decisions of the Merit Systems Protection Board:

a. *White v. Department of the Air Force,* 63 M.S.P.R. 90 (1994) ("White 1");

b. *White v. Department of the Air Force,* 71 M.S.P.R. 607 (1996) ("White 2");

c. *White v. Department of the Air Force,* Docket No. DE-1221-92-0491-M-1 (1998) ("White 3").

(3) *LaChance v. White,* 155 F.3d 569 (Fed. Cir. 1998) (Table), granting Federal Circuit review.

JURISDICTION

The United States Court of Appeals for the Federal District filed its opinion on May 14, 1999.[2] The Court of Appeals denied a timely petition for rehearing and for hearing *en banc* on July 16, 1999.

STATUTORY PROVISIONS INVOLVED IN THIS CASE

The Whistleblower Protection Act, Pub. L. No. 101-12, 103 Stat. 16, 5 U.S.C. § 2302(b), provides in relevant part:

> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority –
>
> . . . .
>
> (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of –
>
> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences –
>
> (i) a violation of any law, rule, or regulation, or,
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of

[2] The Petitioner objected to the court below asserting jurisdiction on various procedural grounds. That court nevertheless assumed jurisdiction.

> authority, or a substantial and specific danger to public health or safety,
>
> if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or
>
> (B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences:
>
> (i) a violation of any law, rule, or regulation, or,
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.
>
> . . . .
>
> This subsection shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to the Congress.[3]

---

[3] The balance of the statute is unrelated to the issues herein.

STATEMENT OF THE CASE

In 1992, the Tactical Air Command of the United States Air Force ("TAC")[4] implemented the "Bright Flag Quality Education System" ("QES") mandating quality standards for colleges and universities contracting with Air Force bases to provide educational services. TAC contracts with the schools included these quality standards.

The schools disliked the new requirements. Prior to QES, both the Nellis AFB and TAC educational programs had received acclaim. Nevertheless, TAC directed its Educational Service Officers ("ESO's") to incorporate these standards into the school contracts by June 30, 1992.

At the time, Petitioner John E. White was a GM-13 Supervisory Education Services Specialist at Nellis Air Force Base, Nevada. His duties included working with the colleges and universities providing the on-base education.

One of the contracting schools requested a meeting concerning QES. The meeting took place at Nellis AFB on May 4, 1992. Petitioner White attended this meeting. During the meeting Petitioner White stated the standards were poorly drafted, difficult to implement, lacked input from the educational institutions, and likely to lose airbase educational programs not only at Nellis, but also

---

[4] The Air Force consolidated this Command (TAC) into the Air Combat Command (A.C.C.) shortly after the Whistleblower incident herein occurred. This Petition will use the organization's original name, TAC.

nationwide. White reiterated his criticisms in more detail when meeting with senior officers.

As a result, White received notice that certain TAC officers responsible for the QES Program wanted him disciplined. Several weeks later, on June 2, 1992, White was detailed to a reduced grade, GS-12, Administrative Officer position for 120 days. Although he retained his pay level, White moved to an out-of-the-way office to a previously non-existent position with no duties. The Air Force severed him from the education program.

Ironically, while Petitioner White suffered this punishment, HQ TAC withdrew the QES requirements and canceled the June 30, 1992, implementation date. Petitioner White's removal from the education program prompted an investigation of the QES by the Air Force Air Education and Training Command (AETC).[5] The investigating committee, PAT, faulted the QES program and rejected its implementation. HQ TAC incorporated most of Petitioner White's criticisms into revised standards.

Despite the negative findings as to the QES program, for 4½ years TAC detailed Petitioner White to non-educational positions.

Petitioner White filed a complaint with the Office of Special Counsel, which provided him with a "right to

---

[5] The Air Force Education and Training Command appointed a Process Action Team (PAT) to evaluate the program. Dr. Anita Renard, Chief of Education and Training for AETC, was the chair. The MSPB record contains the report submitted to the Commanding General of AETC.

sue" letter. He then filed a Prohibited Personnel Practice Complaint before the Merit Systems Protection Board (MSPB). On October 26, 1992, an administrative judge denied jurisdiction based on the non-protectability of the disclosure. On appeal, the full Board found jurisdiction because White had:

> . . . disclosed information he reasonably believed evidence [sic] of 'gross mismanagement' and that the record contains evidence of substantial support for the appellant's concerns. . . . "

(White 1 at 95). On remand, the administrative judge ruled for White and ordered TAC to return him to his prior status.

The Air Force appealed. The Office of Personnel Management ("OPM") intervened, claiming that the MSPB decision was based on Petitioner White's subjective fears, not his "beliefs." Two years later, on September 24, 1996, the MSPB issued its opinion rejecting the Air Force's appeal and its "disloyalty" defense under the "law of the case" doctrine and denied OPM intervention.

Reversing itself on March 10, 1998, the MSPB allowed OPM intervention, and considered its "reasonable belief" issue. At the same time, it issued its opinion in White 3, rejecting the two issues presented by OPM. The MSPB reiterated its long-held view that reasonable belief is established by evidence that the complaining employee

> . . . was familiar with the alleged improper activities and that his belief was shared by other similarly situated employees . . .

(White 3 at 43).

OPM petitioned the Court below for review, and such petition was granted.

The Federal Circuit issued its decision herein on May 14, 1999, reversing the decision of the MSPB in White 3, holding that

> . . . without an independent review of the disclosures by the board, under a new test devised by it, an employee's disclosure does not deserve protection.

(Appendix, Slip Op. at 5).

The Court said the MSPB must "independently review the basis for a party's beliefs" by use of a "reasonable person" standard. (*Id.*)

White, an individual without relief (other than 1996 status reinstatement) or resolution for almost eight years, petitioned for rehearing, which was denied below.

Finally, Petitioner White submits this Writ of Certiorari seeking reversal of the Federal Circuit ruling.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT COURT'S "DISINTERESTED OBSERVER" TEST TO EVALUATE THE EMPLOYEE'S BELIEF IN THE DISCLOSURE'S TRUTH RUNS CONTRARY TO PRECEDENT AND PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW.

The Whistleblower Protection Act (WPA), 5 U.S.C. § 2302(b)(8)(A)&(B), protects:

> (A) any disclosure of information by an employee or applicant which the employee or applicant ***reasonably believes*** evidences. . . .
>
> (B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant ***reasonably believes*** evidences . . .

agency misdeeds and reports them. (Emphasis added.)

The Federal Circuit decision below, however, initiates a new standard for the reasonableness of an employee's or applicant's belief. Instead of an objective evaluation of the ***employee's*** beliefs, (*see Frederick v. Department of Justice*, 73 F.3d 349 at 352), the test now applies an "informed disinterested observer's" belief concerning the agency's action, (Appendix, Slip Op. at 6). This determination contradicts earlier cases where, at most, the test for reasonable belief:

> . . . was one which a ***reasonable person in the employee's position*** would believe to evidence mismanagement, danger, or any of the situations specified in 5 U.S.C. § 2302(b)(8).

Ramos v. F.A.A., 4 M.S.P.R. 388, 392 fn. 1 (1980). (Emphasis added.)

Other decisions have relied on the above "reasonable person" test. In *Geyer v. Dept. of Justice*, 63 M.S.P.R. 13, 17 (1994), the Board indicated that the whistleblower need not demonstrate gross mismanagement; but show the matter he/she reported was one a "reasonable person in his position would believe evidenced mismanagement or any of the other situations specified in 5 U.S.C.

§ 2302(b)(8)." Another form of proof would be "that his belief was shared by similarly situated employees." *Schlosser v. Dept. of Interior,* 75 M.S.P.R. 15, 17 (1997).

Further, when determining the reasonableness of this hypothetical observer's belief, the MSPB ***must*** presume the regularity of agency action, unless the record contains incontrovertible proof to the contrary. (Appendix, Slip Op. at 6-7). The whistleblower bears the burden of overcoming this presumption – with "irrefragable proof."[6] (Appendix, Slip Op. at 7).

In most cases the conscientious and truthful employee cannot meet this stringent burden of disproving the "regularity" of the agency's action. By lowering the burden on federal employers, the Federal Circuit eviscerates the Whistleblower Act's objective – protecting the employee who exposes government wrongdoing. Concerning the WPA, Congress stated in S. Report No. 969, 95th Cong., 2nd Sess. 8 (1978):

> In the vast federal bureaucracy, it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a Federal agency there are employees who know that it has occurred, and who are outraged by it. . . . These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.

Concerning the test which triggers this protection, Congress declared:

---

[6] *See* footnote 1, *supra,* for the definition of "irrefragable."

> . . . the employee must only have a reasonable belief that his/her disclosure is true in order for a disclosure to qualify as protected; the actual veracity of any disclosure, in theory, does not affect whether a disclosure is protected.

S. Report No. 413, 100th Cong., 2nd Sess. 12 (1988).

The decision below is erroneous. This Court must reverse the Federal Court's ruling.

II. BECAUSE THE FEDERAL CIRCUIT COURT DECISION DEVIATES FROM SETTLED WPA PRECEDENT, THIS COURT MUST EXERCISE ITS SUPERVISORY POWERS.

In the Petition for Rehearing to the Federal Circuit Court, Petitioner White cited six cases which the instant decision adversely affected:

1. *Clark v. Dept. of the Army*, 997 F.2d 1466 (Fed. Cir. 1993)
2. *Frederick v. Dept. of Justice*, 73 F.3d 349 (Fed. Cir. 1996)
3. *Horton v. Dept. of the Navy*, 66 F.3d 279 (Fed. Cir. 1995)
4. *Marano v. Dept. of Justice*, 2 F.3d 1137 (Fed. Cir. 1993)
5. *Warren v. Dept. of the Army*, 804 F.2d 654 (Fed. Cir. 1986)
6. *Weber v. Dept. of the Army*, 9 F.3d 97 (Fed. Cir. 1993)

The case has a similar impact on MSPB precedent, including the often-cited "White 3," *supra*.

Using the established standard for WPA – prior to the Federal Circuit's decision below – the MSPB record contains sufficient factual bases for Petitioner White's beliefs that the QES constituted governmental mismanagement. The evidence includes Petitioner White's professional opinions, other ESO's opinions, criticism from the private educational institutions contracting with TAC, adverse opinions in personnel and non-TAC Air Force commands and, most significant, the Air Force's withdrawal of the QES – which occurred after Petitioner White's criticisms.

The Federal Circuit Court ignored this evidence and/or found it unpersuasive in light of the new test of the "hypothetical reasonable man's opinion." The court even reinstituted reliance on the previously precluded personal motive evidence.

> . . . we also would expect the board to consider ***personal bias or self-interestedness in the matter.***

(Appendix, Slip Op. at 7). (Emphasis added). *Contra, Bump v. Dept. of Interior,* 69 M.S.P.R. 254, 358 (1998); *Special Counsel v. Starrett,* 28 M.S.P.R. 60 (1985) ("The WPA makes no provision for considering whether the employee's ***personal motivation*** rendered his belief not genuine."). (Emphasis added).

Again, reversal is necessary.

III. THE QUESTION PRESENTED IN THIS CASE IS AN IMPORTANT ONE NECESSITATING SUPREME COURT REVIEW.

If permitted to stand, the decision below will chill and preclude federal employees from disclosing agency mismanagement and/or wrongdoing. The only successful cases will be those in which the employee can meet the "hypothetical individual" test, overcome the presumption in favor of the government, and present "irrefragable proof."

The above is *not* the purpose of the Whistleblower Protection Act, which protects governmental employees who come forward. The Federal Circuit opinion renders the WPA impotent. This Court must restore the WPA's power to shield governmental employees from adverse action after revealing governmental mismanagement and/or wrongdoing.

The Federal Circuit Court's decision is erroneous, warranting reversal.

CONCLUSION

The Supreme Court should grant this Petition for Certiorari.

Respectfully submitted this 11th day of October, 1999.

JOHN E. WHITE
Petitioner

JAMES R. KLIMASKI*
LAW OFFICES OF KLIMASKI, P.C.
1899 L Street NW
Suite 1250
Washington, DC 20036-3805
202-296-5600

RICHARD S. SEGERBLOM
704 South 9th Street
Las Vegas, NV 89101

**Counsel of Record*

United States Court of Appeals
for the Federal Circuit

98-3249

JANICE R. LACHANCE, Director,
Office of Personnel Management,

Petitioner,

v.

JOHN E. WHITE,

Respondent,

and

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

DECIDED: May 14, 1999

Harold D. Lester, Jr., Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for petitioner. With him on the brief was *David M. Cohen*, Director. Of counsel on the brief were *Lorraine Lewis*, General Counsel, and *Steven E. Abow*, Office of General Counsel, Office of Personnel Management, of Washington, DC. Of counsel were *Anthony H. Anikeeff*, Assistant Director, Civil Division, Department of Justice, and *Ana A. Mazzi*, Attorney, Office of the General Counsel, Office of Personnel Management.

S. Timothy Buynak, Jr., Hatch and Parent, of Santa Barbara, California, argued for respondent John E. White.

Eric D. Flores, Attorney, Office of the General Counsel, Merit Systems Protection Board, of Washington, DC, argued for respondent Merit Systems Protection Board. With him on the brief were *Mary L. Jennings*, General

Counsel, and *Martha B. Schneider*, Assistant General Counsel.

Thomas M. Devine, Government Accountability Project, of Washington, DC, argued for amicus curiae Government Accountability Project.

Appealed from: Merit Systems Protection Board

Before MAYER, *Chief Judge*, NEWMAN, and LOURIE, *Circuit Judges*.

MAYER, *Chief Judge*.

The Director of the Office of Personnel Management ("OPM") seeks review of the final order of the Merit Systems Protection Board, *White v. Department of the Air Force*, 78 M.S.P.R. 38 (1998), which found that Air Force employee John E. White made disclosures protected by the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8) (1994) ("WPA"). Because the board failed to properly evaluate whether White had a reasonable belief that his disclosures evidenced gross mismanagement by the Air Force, we reverse and remand.

Background

White was a GM-13 Supervisory Education Services Specialist at Nellis Air Force Base, Nevada. His duties included working with colleges and universities that provide on-base educational services. In 1992, the Air Force implemented the Bright Flag Quality Education System ("QES"), which mandated quality standards for schools contracting with Air Force bases for educational services. The Air Force required all bases to incorporate the QES

standards in the memoranda of understanding that they sign with the schools.

On May 4, 1992, the Air Force held a meeting attended by representatives of the schools and the Tactical Air Command. During the meeting, White criticized the manner in which the Air Force implemented the QES, particularly the lack of notice and input from the schools. He also criticized some of the standards required by the QES, claiming that they were too burdensome and would seriously reduce the education opportunities available on-base. White repeated these concerns in private meetings with Air Force officials.

On June 1, 1992, White was detailed for 120 days to a GS-12 Administrative Officer position without a reduction in pay because his supervisor purportedly lost confidence in his ability to support the QES. White then filed a complaint with the Office of Special Counsel ("Special Counsel"), claiming that the detail was in violation of the WPA. On July 23, 1992, the Special Counsel informed White of his right to pursue his claim before the Merit Systems Protection Board, which he did.

In an October 26, 1992 initial decision, an administrative judge found that White's disclosures were not protected by the WPA. The board reversed this decision, however, holding that White had disclosed information that he reasonably believed evidenced gross mismanagement. *See White v. Department of the Air Force*, 63 M.S.P.R. 90, 95 (1994). On remand, the administrative judge found that the Air Force had violated the WPA, canceled White's detail, and ordered that he be returned to his prior status. The Air Force appealed and OPM sought to

intervene on its behalf. Finding that it did not attempt to intervene as early as practicable, the board held that OPM did not satisfy the requirements for intervention under 5 U.S.C. § 7701(d)(1) (1994). *See White v. Department of the Air Force*, 71 M.S.P.R. 607, 616-17 (1996). The board also affirmed the initial finding of a WPA violation. *See id.* at 615-16.

OPM filed for review in this court, asserting that the board erred in rejecting its attempt to intervene. However, the board subsequently requested a remand of the petition, admitting that the intervention was timely and expressing its willingness to address OPM's substantive arguments. On remand, the board affirmed its conclusion that White's disclosures were protected by the WPA. *See White*, 78 M.S.P.R. at 43. OPM petitioned this court for review of the board's decision, which we granted. *See Lachance v. White*, 155 F.3d 569 (Fed. Cir. 1998) (Table).

Discussion

We must affirm the board's decision unless it is: "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c) (1994). "Interpretation of a statute is a question of law that we review *de novo*." *Frederick v. Department of Justice*, 73 F.3d 349, 351-52 (Fed. Cir. 1996).

The board found that the Air Force violated section 2302(b) of the WPA, which provides in part that:

> (b) Any employee who has the authority to take, direct others to take, recommend, or

> approve any personnel action, shall not, with respect to such authority . . .
>
> (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee . . . because of –
>
> (A) any disclosure of information by an employee . . . which the employee . . . reasonably believes evidences . . .
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. . . .

5 U.S.C. § 2302(b). "We have interpreted the WPA to require proof of four elements to establish a violation of section 2302(b)(8): '(1) the acting official has the authority to take, recommend, or approve any personnel action; (2) the aggrieved employee made a disclosure protected under section 2302(b)(8); (3) the acting official used his authority to take, or refuse to take, a personnel action against the aggrieved employee; (4) the acting official took, or failed to take, the personnel action against the aggrieved employee because of the protected disclosure.' " *Frederick*, 73 F.3d at 352 (quoting *Eidmann v. Merit Sys. Protection Bd.*, 976 F.2d 1400, 1407 (Fed. Cir. 1992)). White has the burden of showing that he made a protected disclosure. *See Horton v. Department of Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995).

At issue here is whether White had a reasonable belief that he uncovered gross mismanagement, thereby protecting his disclosures under the WPA. *See* 5 U.S.C. § 2302(b)(8)(A); *Frederick*, 73 F.3d at 352; *Horton*, 66 F.3d at 283. He provided evidence that he and other similarly

situated employees believed that his disclosures exposed gross mismanagement. The board held that this evidence was sufficient to find a violation of the WPA, concluding that an employee may satisfy the reasonable belief test "by showing that he was familiar with the alleged improper activities and that his belief was shared by other similarly situated employees." *White*, 78 M.S.P.R. at 43. OPM argues that such evidence, without an independent review of the disclosures by the board, is inadequate to support a violation of the WPA. We agree.

The board must look for evidence that it was reasonable to believe that the disclosures revealed misbehavior described by section 2302(b)(8). *See Horton*, 66 F.3d at 283 (criticizing the board for failing to "review [the] evidence from the viewpoint of [the employee's] 'reasonable belief' "). Our review of board holdings under the WPA have applied the reasonable belief test by independently reviewing the basis for a party's beliefs as it relates to government misconduct. *See Frederick*, 73 F.3d at 353 ("Considering all the evidence presented, including that which detracts from a 'reasonable belief,' the record does not contain substantial evidence to support a reasonable belief by [the employee] that [there] . . . was a violation of law."); *Haley v. Department of Treasury*, 977 F.2d 553, 557 (Fed. Cir. 1992) ("Petitioner's experience as an Examiner and the clear language of the relevant authorities make Petitioner's claim [that his disclosures were protected under the WPA] untenable."); *Eidmann*, 976 F.2d at 1407 ("The record supports the Board's finding that [the employee] reasonably believed his disclosures uncovered violations. . . . "). Similarly, application of the reasonable person standard in other

areas requires independent review of the evidence. *See, e.g., Applied Med. Resources Corp. v. United States Surgical Corp.*, 147 F.3d 1374, 1376, 47 USPQ2d 1289, 1291 (Fed. Cir. 1998) ("The trial court may grant [a] motion for judgment as a matter of law only if, upon the record before the jury, it was convinced that reasonable persons could not reach a verdict for [the non-movant]."); *King v. Hillen*, 21 F.3d 1572, 1580, 1583 (Fed. Cir. 1994) (approving the Equal Employment Opportunity Commission Guidelines objective reasonableness standard, which states that "[i]n determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances. . . . "); *Jay v. Secretary of Dep't of Health and Human Servs.*, 998 F.2d 979, 984 (Fed. Cir. 1993) ("We therefore hold as a matter of law that on the undisputed facts of record a reasonable person could not conclude that the [plaintiffs] failed to prove that the DPT vaccine was the likely cause of [their son's] death.").

We conclude, therefore, that the proper test is this: could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence gross mismanagement? A purely subjective perspective of an employee is not sufficient even if shared by other employees. The WPA is not a weapon in arguments over policy or a shield for insubordinate conduct. Policymakers and administrators have every right to expect loyal, professional service from subordinates who do not bear the burden of responsibility. If personnel management is to be undone by the board, which of course has no responsibility for the

results of its orders, the bases for its action must be thoroughly established.

In this case, review of the Air Force's policy and implementation via the QES standards might well show them to be entirely appropriate, even if not the best option. Indeed, this review would start out with a "presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations. . . . And this presumption stands unless there is 'irrefragable proof to the contrary.' " *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 795 (Fed. Cir. 1993) (internal quotations and citations omitted); *cf. Staton v. United States*, 228 Ct. Cl. 797, 807 (1981) (rejecting whistleblower claim of employee removed for unsatisfactory performance because "[t]he presumption that Government officials act in good faith stands unrebutted"). Without impugning the motives of the putative whistleblower and his similarly situated supporters, we also would expect the board to consider personal bias or self-interestedness in the matter. In short, there should be evenhanded development of the record. The board may not limit its inquiry to an employee "showing that he was familiar with the alleged improper activities and that his belief was shared by other similarly situated employees." *White*, 78 M.S.P.R. at 43. This testimony may be of some relevance, *see Frederick*, 73 F.3d at 352-53, but it is insufficient to conclude that White had a reasonable belief that he disclosed gross mismanagement.

Conclusion

Accordingly, the decision of the Merit Systems Protection Board is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED

United States Court of Appeals for the Federal Circuit

ORDER

(Filed Jul. 16, 1999)

A combined petition for rehearing and suggestion for rehearing en banc having been filed by John E. White, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing en banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on July 23, 1999.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: July 16, 1999

cc: HAROLD D. LESTER
S. TIMOTHY BUYNAK, JR., ERIC D. FLORES
THOMAS M. DEVINE

LACHANCE V WHITE, 98-3249
(MSPB – DE1221920492-M-1)

Supreme Court, U.S.
FILED
JAN 12 2000
CLERK

(2)

No. 99-629

In the Supreme Court of the United States

JOHN E. WHITE, PETITIONER

v.

JANICE R. LACHANCE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
WILLIAM KANTER
HAROLD D. LESTER, JR.
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

2400

QUESTION PRESENTED

Whether the court of appeals correctly determined that, in evaluating whether a putative whistleblower had an objective "reasonable belief" that his prior disclosures evidenced misconduct prohibited by the Whistleblower Protection Act of 1989, 5 U.S.C. 2302(b)(8), the Merit Systems Protection Board may not limit the evidence that it considers to the subjective beliefs of the putative whistleblower and other similarly situated employees.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	12
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Alabama v. *White*, 496 U.S. 325 (1990)	9
Alaska Airlines, Inc. v. *Johnson*, 8 F.3d 791 (Fed. Cir. 1993)	12
Frederick v. *Department of Justice*, 73 F.3d 349 (Fed. Cir. 1996)	7, 8
Gonzales v. *Defense Logistics Agency*, 772 F.2d 887 (Fed. Cir. 1985)	12
Haley v. *Department of the Treasury*, 977 F.2d 553 (Fed. Cir. 1992)	8
Harris v. *Forklift Sys., Inc.*, 510 U.S. 17 (1993)	8
Herman v. *Department of Justice*, 193 F.3d 1375 (Fed. Cir. 1999)	8
Horton v. *Department of the Navy*, 66 F.3d 279 (Fed. Cir. 1995), cert. denied, 516 U.S. 1176 (1996)	7
Illinois v. *Gates*, 462 U.S. 213 (1983)	10
King v. *Department of Health & Human Servs.*, 133 F.3d 1450 (Fed. Cir. 1998)	5
King v. *Hillen*, 21 F.3d 1572 (Fed. Cir. 1994)	8
Maryland v. *Buie*, 494 U.S. 325 (1990)	9
NLRB v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975)	8
Ohio v. *Robinette*, 519 U.S. 33 (1996)	9
Ornelas v. *United States*, 517 U.S. 690 (1996)	10
Phillips Plastics Corp. v. *Kato Hatsujou Kabushiki Kaisha*, 57 F.3d 1051 (Fed. Cir. 1995)	9

Cases—Continued: Page

Quality Mfg. Co., 195 N.L.R.B. 197 (1972) 9
Torncello v. *United States*, 681 F.2d 756 (Ct. Cl. 1982) 12
United States v. *Chemical Found., Inc.*, 272 U.S. 1 (1926) 12
United States v. *Cortez*, 449 U.S. 411 (1981) 9
United States v. *Gray*, 137 F.3d 765 (4th Cir.), cert. denied, 119 S. Ct. 157 (1998) 10
White v. *Department of the Air Force*, 63 M.S.P.R. 90 (1994) 3

Statutes and regulation:

Whistleblower Protection Act of 1989:
5 U.S.C. 1221 3
5 U.S.C. 2302(b)(8) 2, 5
5 U.S.C. 2302(b)(8)(A) 3
5 U.S.C. 2302(b)(8)(A)(i) 11
5 U.S.C. 2302(b)(8)(A)(ii) 11
5 U.S.C. 7701(d)(1) (1994) 4
5 C.F.R. 1201.114(g) (1994) 4

Miscellaneous:

Black's Law Dictionary (6th ed. 1990) 6

In the Supreme Court of the United States

No. 99-629

JOHN E. WHITE, PETITIONER

v.

JANICE R. LACHANCE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 174 F.3d 1378. The opinion and order of the Merit Systems Protection Board is reported at 78 M.S.P.R. 38 (1998).[1]

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1999. A petition for rehearing was denied on

[1] The opinion and order of the Merit System Protection Board is reproduced in this brief at App., *infra*, 1a-8a.

July 16, 1999 (Pet. App. 10). The petition for a writ of certiorari was filed on October 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Mr. John E. White, was a GM-13 Supervisory Education Services Specialist (ESS) at Nellis Air Force Base, Nevada. His duties included negotiating memoranda of understanding with those colleges and universities providing on-base education services at Nellis. In 1992, the Air Force proposed to implement the Bright Flag Quality Education System (QES), which was intended to establish quality standards for schools contracting with Air Force bases for educational services. Pet. App. 2.

On May 4, 1992, the Air Force conducted a meeting attended by representatives of some of the schools and the Tactical Air Command. During the meeting, petitioner publicly criticized some of the standards that the QES would require, claiming that they were too burdensome and would seriously reduce the education opportunities available on base. Petitioner repeated these concerns in private meetings with Air Force officials. Pet. App. 3.

On June 1, 1992, petitioner's immediate supervisor detailed petitioner for 120 days from his GS-13 ESS position to a GS-12 Administrative Officer position, with no reduction in pay, because his supervisor had lost confidence in his ability to implement and support the QES. Petitioner thereupon filed a complaint with the Office of Special Counsel (OSC), claiming that his complaints regarding the QES were protected by the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. 2302(b)(8), and that the 120-day detail violated the WPA. Pet. App. 3. The WPA defines a "prohibited

personnel practice" as the taking or failure to take a personnel action with respect to an employee because of

> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences —
>
> > (i) a violation of any law, rule, or regulation, or
> >
> > (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law * * * .

5 U.S.C. 2302(b)(8)(A). On July 23, 1992, OSC notified petitioner that he had the right to seek corrective action with the Merit Systems Protection Board (MSPB) under 5 U.S.C. 1221, which he did. Pet. App. 3.

Before the MSPB, petitioner alleged that he had made disclosures that he reasonably believed constituted gross mismanagement and that were therefore protected under the WPA. In an initial decision dated October 26, 1992, an MSPB administrative judge dismissed petitioner's claim, finding that his disclosures at various meetings did not rise to the level of a "reasonable belief" of gross mismanagement protected by the WPA. Pet. App. 3. The full board reversed this decision, finding that an objective "reasonable belief" that agency conduct constitutes gross mismanagement is conclusively established if the putative whistleblower shows (1) that he is familiar with the conduct in question and subjectively believes that it constitutes gross mismanagement and (2) that other similarly situated employees share his belief about the conduct. *White* v. *Department of the Air Force*, 63 M.S.P.R. 90, 95 (1994); Pet. App. 3. In finding that petitioner had established a

"reasonable belief" of gross mismanagement, the MSPB did not rely upon any review or analysis of the QES standards to which petitioner objected, and did not identify the reasons that the proposed QES standards could objectively be deemed to evidence gross mismanagement.

On remand, the MSPB administrative judge, adopting the full board's determination that petitioner's disclosures were protected by the WPA, found that the Air Force had violated the WPA by detailing petitioner, canceled petitioner's detail, and ordered that he be returned to his prior status. Pet. App. 3. The Air Force appealed to the full board, and the Office of Personnel Management (OPM) intervened as a matter of right pursuant to 5 U.S.C. 7701(d)(1) and 5 C.F.R. 1201.114(g) (1994).[2] After considering OPM's arguments, the MSPB affirmed its prior conclusion that petitioner's disclosures evidenced an objective "reasonable belief" of gross mismanagement. Pet. App. 4.

2. The court of appeals reversed. Pet. App. 1-9. It found that the MSPB's per se test for establishing an objective reasonable belief—"that [the employee] was familiar with the alleged improper activities and that his belief was shared by other similarly situated employees"—necessarily excluded consideration of other potentially relevant factors, including independent and objective review of the allegedly improper activities themselves. *Id.* at 6-8. The court of appeals recognized that "[a] purely subjective perspective of an employee

---

[2] The Board initially denied OPM's notice of intervention on the ground that OPM had not sought to intervene as early as practicable. Pet. App. 3-4. Ultimately, however, the Board conceded that OPM's intervention was timely, and considered OPM's arguments on the merits. *Id.* at 4.

is not sufficient" to establish an objective reasonable belief "even if shared by other employees." *Id.* at 7. It determined, therefore, that a proper test for establishing an objective reasonable belief "is this: could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence gross mismanagement?" *Ibid.* The court of appeals then remanded this case to the MSPB for reconsideration of the facts of this case in light of all relevant evidence. *Id.* at 9.

ARGUMENT

The decision of the court of appeals is both plainly correct, and consistent with the decisions of this Court and the court of appeals. Accordingly, further review is not warranted (especially given the present interlocutory posture of the case).

1. To maintain a claim under the WPA, a federal employee must establish, among other things, that he engaged in whistleblower activity by making a disclosure protected under the WPA—that is, one that he "reasonably believes" evidences a violation of law, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety.[3] 5 U.S.C. 2302(b)(8); see *King* v. *Department of Health & Human Servs.*, 133 F.3d 1450, 1452 (Fed. Cir. 1998). None of the parties to this case disputes the court of appeals' holding that the test for determining whether a putative whistleblower has a "reasonable belief" that a disclosure evidences prohibited miscon-

[3] The putative whistleblower must also establish that the agency took, or threatened to take, a "personnel action" as defined in the WPA, and that the whistleblower raised his whistleblower reprisal claim with the Office of Special Counsel.

duct is an objective one. If the putative whistleblower's belief is not objectively reasonable, the disclosure is not protected, precluding a claim under the WPA.

However, despite this ostensible recognition that the determination of reasonable belief involves an objective assessment, the MSPB set forth—and the petitioner supports—a per se rule governing whether a putative whistleblower has established a reasonable belief in the occurrence of improper activity based on his, and other similarly situated employees', *subjective* beliefs. Pursuant to this standard, once a putative whistleblower made a showing simply "that he was familiar with the alleged improper activities and that his belief was shared by other similarly situated employees," Pet. App. 6, the MSPB would have been precluded from considering any evidence in the record regarding "reasonable belief" beyond these two factual findings and from evaluating the underlying basis of the alleged belief independently to determine whether such belief was, in fact, objectively reasonable.

The court of appeals correctly recognized that, contrary to the language of the statute, the MSPB decision below improperly substituted a "subjective perspective" standard for one of objective reasonableness.[4]

---

[4] *Black's Law Dictionary* 1265 (6th ed. 1990) provides two definitions for the term "reasonable belief." In the criminal context, reasonable belief or probable cause sufficient to make an arrest exists when an officer's knowledge of the facts and circumstances "are sufficient in themselves to justify a man of average caution in belief that a felony has been or is being committed." In the tort context, the existence of a reasonable belief denotes both that the actor actually believes in a fact or circumstance, *and* "that the circumstances which he knows, or should know, are such as to cause a reasonable man so to believe." The objective standard set forth in

Pet. App. 7. The court held that the two factors identified in the MSPB's per se test "may be of some relevance" in determining whether a putative whistleblower's belief is objectively reasonable. *Id.* at 8. It further held, however, that the "board may not limit its inquiry" to those two factors. *Ibid.* Specifically, the court of appeals recognized that, in a case in which the alleged impropriety involves written policy, the board should review and consider the allegedly improper policy itself in evaluating the objective reasonableness of the putative whistleblower's belief that prohibited conduct exists. *Id.* at 7-8. As the court of appeals properly determined, evidence of the putative whistleblower's actual belief, and of the subjective beliefs of other employees, cannot per se establish an objectively "reasonable belief."

2. Contrary to petitioner's claim (Pet. 8), the court of appeals has not "initiate[d] a new standard for the reasonableness of an employee's or applicant's belief." The court has repeatedly held that a finding of reasonable belief within the meaning of the WPA must be supported by substantial evidence, and that courts must consider the contradictory evidence in the record. See, *e.g.*, *Frederick* v. *Department of Justice*, 73 F.3d 349, 352-353 (Fed. Cir. 1996); *Horton* v. *Department of the Navy*, 66 F.3d 279, 283 (Fed. Cir. 1995) (finding, after examination of the entire record, that the whistleblower's "reasonable belief of wrongdoing was not supported by substantial evidence"), cert. denied, 516 U.S. 1176 (1996). Pursuant to this inquiry, the court considers whether the record establishes "that a reasonable person would conclude" that the disclosure revealed

---

the opinion of the court of appeals is consistent with both of these formulations.

wrongdoing under the WPA. *Herman* v. *Department of Justice*, 193 F.3d 1375, 1379-1380 (Fed. Cir. 1999); see also *Frederick*, 73 F.3d at 353 ("no reasonable fact-finder could conclude" that the disclosure was protected under the statute); *Haley* v. *Department of the Treasury*, 977 F.2d 553, 557 (Fed. Cir. 1992) (holding, after considering the background statutory scheme and "[p]etitioner's extensive experience" in his job, that petitioner's belief that a violation of FIRREA and its implementing regulations had occurred was not reasonable).

Furthermore, in a host of other contexts, it is well settled that subjective belief alone is not sufficient to establish reasonableness under an objective standard, and that application of a reasonableness standard requires an independent evaluation of the totality of the circumstances. For example, in the employment discrimination context both this Court and the court of appeals have held that, when determining whether an "environment would reasonably be perceived" as hostile or abusive, courts must look at "all the circumstances," *Harris* v. *Forklift Sys. Inc.*, 510 U.S. 17, 22-23 (1993) (Title VII); actual psychological harm constitutes only one relevant factor that "may be taken into account," *ibid.*; accord *King* v. *Hillen*, 21 F.3d 1572, 1580 (Fed. Cir. 1994) (approving the Equal Employment Opportunity Commission Guidelines objective reasonableness standard, which states that "[i]n determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances"). Similarly, reasonableness requirements in the National Labor Relations Act are measured "by objective standards, under all the circumstances of the case." *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 257 n.5 (1975)

(quoting *Quality Mfg. Co.*, 195 N.L.R.B. 197, 198 n.3 (1972)). Likewise, under patent law, the "reasonable apprehension of suit" test, applied in determining whether an alleged infringer can bring declaratory judgment action against the patentee, "requires more than the nervous state of mind of a possible infringer; it requires that the objective circumstances support such an apprehension." *Phillips Plastics Corp.* v. *Kato Hatsujou Kabushiki Kaisha*, 57 F.3d 1051, 1053-1054 (Fed. Cir. 1995).

This Court has most frequently assessed reasonableness in the Fourth Amendment context, considering whether officers have "a reasonable belief based on specific and articulable facts" that a certain intrusion is warranted. *Maryland* v. *Buie*, 494 U.S. 325, 337 (1990) (allowing protective sweep of a house during arrest where the officers have "reasonable belief" that the area harbors an individual posing a danger to those on the arrest scene). In such cases, reasonableness "is measured in objective terms by examining the totality of the circumstances." *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996) (internal quotation marks omitted); see also, *e.g.*, *Alabama* v. *White*, 496 U.S. 325, 328 (1990) (totality of circumstances must be considered in determining whether objectively reasonable suspicion existed). The "totality of the circumstances" that the court must evaluate in determining whether a suspicion was reasonable refers to "the whole picture," from which the court must be able to identify a "particularized and objective basis" for the reasonable suspicion. *United States* v. *Cortez*, 449 U.S. 411, 417 (1981). And to support a magistrate's warrant determination, "[s]ufficient information must be presented" to "allow that official to determine probable cause; his action cannot be a mere

ratification of the bare conclusions of others." *Illinois* v. *Gates*, 462 U.S. 213, 239 (1983).

The teaching of all of these cases—that reasonableness requires an objective evaluation of the totality of the circumstances—refutes petitioner's attempt to equate "an objective evaluation of the employee's beliefs" with a mandatory acceptance, and reliance upon, his and others' subjective beliefs, to the exclusion of any other evidence. It would be inappropriate for a court to find probable cause to search based solely upon the shared views of several police officers, without discussing the basis for that belief. "Because probable cause," like the WPA "reasonable belief" standard, "is an objective test, [the court must] examine the facts within the knowledge of arresting officers to determine whether they provide a probability on which reasonable and prudent persons would act; [the court] do[es] not examine the subjective beliefs of the arresting officers to determine whether *they* thought that the facts constituted probable cause." *United States* v. *Gray*, 137 F.3d 765, 769 (4th Cir.) (citing *Ornelas* v. *United States*, 517 U.S. 690, 695-696 (1996)), cert. denied, 119 S. Ct. 157 (1998). Similarly, the court of appeals correctly found that reasonable belief in gross mismanagement is not established merely by the shared views of several employees, without an analysis of the basis for their views.

Because the objective reasonableness standard set forth by the court of appeals comports both with the language of the statute, and with precedent from this Court and the court of appeals, no further review is warranted.

3. Petitioner suggests that the decision below fails to provide federal employees with the protection Congress intended for disclosing "governmental mis-

management and/or wrongdoing" (Pet. 12), but he is mistaken. Disclosures made by federal employees are protected by the WPA only if they are reasonably believed to evidence either "a violation of any law, rule, or regulation" (5 U.S.C. 2302(b)(8)(A)(i)), or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety" (5 U.S.C. 2302(b)(8)(A)(ii)). Conspicuously excluded from statutory protection are statements of disagreement with agency policy—as the court of appeals recognized, "[t]he WPA is not a weapon in arguments over policy or a shield for insubordinate conduct." Pet. App. 7. Also excluded from statutory protection are allegations of mismanagement that is not serious enough to constitute *gross* mismanagement. Finally, allegations of gross mismanagement are protected only if they are objectively reasonable. These limitations, which appear on the face of the statute, were not created by the decision below but by Congress itself. It is petitioner's proposed standard, and not the decision below, that would undermine the purpose of the WPA, by extending the protection of the statute to any allegation of mismanagement believed by the employee and others, whether or not their belief is objectively reasonable.

4. Petitioner claims that the court below imposed an insurmountable obstacle to claims under the WPA, by requiring the employee to rebut with "irrefragable proof" a mandatory presumption that public officers perform their duties correctly, fairly, in good faith, and according to law. Pet. i, 12. The court, however, imposed no such requirement. Instead, the court merely noted that the presumption would govern the *ultimate* determination whether gross mismanagement had actually occurred, and therefore it was *relevant* to the

determination whether the employee could reasonably believe that it had occurred. It made this observation in the course of holding that the MSPB had erroneously limited its consideration to the subjective beliefs of the employees, and should instead have considered all available evidence as to the reasonableness of those beliefs. Pet. App. 8. The presumption itself is well established, see *Alaska Airlines, Inc.* v. *Johnson*, 8 F.3d 791, 795 (Fed. Cir. 1993); *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926), as is the principle that "this presumption stands unless there is 'irrefragable proof' to the contrary." *Alaska Airlines*, 8 F.3d at 795 (quoting *Torncello* v. *United States*, 681 F.2d 756, 770 (Ct. Cl. 1982)); see *Gonzales* v. *Defense Logistics Agency*, 772 F.2d 887, 892 (Fed. Cir. 1985). Petitioner has provided no basis for seeking to overturn this long-established precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
WILLIAM KANTER
HAROLD D. LESTER, JR.
Attorneys

JANUARY 2000

APPENDIX

MERIT SYSTEMS PROTECTION BOARD

DE-1221-92-0491-M-I

JOHN E. WHITE, APPELLANT

v.

DEPARTMENT OF THE AIR FORCE, AGENCY

AND

OFFICE OF PERSONNEL MANAGEMENT, INTERVENOR

[Filed: Mar. 10, 1998]

OPINION AND ORDER

Before ERDREICH, Chairman, SLAVET, Vice Chair, and MARSHALL, Member.

This appeal is before the Board to consider the Office of Personnel Management's (OPM) arguments on intervention, on behalf of the agency. For the reasons set forth below, we AFFIRM our prior decisions and conclusions in this appeal.

BACKGROUND

A complete discussion of the factual and procedural history of this case may be found in *White v. Department of the Air Force*, 71 M.S.P.R. 607 (1996) [hereinafter *White II*], and *White v. Department of the Air Force*, 63 M.S.P.R. 90 (1994) [hereinafter *White I*]. The following discussion sets forth the relevant facts necessary to address OPM's arguments on intervention.

On June 1, 1992, the agency detailed the appellant from his Education Services Officer (ESO) position to an Administrative Officer position without reducing his pay. The agency ordered the detail because it lost confidence in the appellant's ability to support the Bright Flag Quality Education System (QES). *White I*, 63 M.S.P.R. at 92-93. The QES contained various quality standards that applied to colleges and universities contracting with Air Force bases throughout the nation to provide on-base educational services ranging from specific classes to degree-granting programs. *Id.* at 93 n. 2.

The appellant alleged that the agency ordered his detail in retaliation for his criticism of the agency's implementation of the QES, and of the standards required under the QES, during meetings with agency officials. The appellant first pursued this matter with the Office of the Special Counsel, and then in an individual right of action (IRA) appeal with the Board, claiming that his disclosures evidenced gross mismanagement and abuse of authority, and were, therefore, protected under the Whistleblower Protection Act (WPA). The administrative judge declined to hold the hearing the appellant had requested, and dismissed the appellant's IRA appeal for lack of jurisdiction, concluding that the appellant's disclosures were not protected under the WPA. *Id.* at 92-94.

In *White I*, however, the Board found that the appellant's disclosures were protected under the WPA because the appellant reasonably believed that he disclosed information that evidenced gross mismanagement. *Id.* at 94. The Board based this conclusion on the appellant's description of his disclosures and on

documentary evidence showing that there was widespread sharing of his views. *Id.* at 95-97. The Board, therefore, remanded the appeal for the administrative judge to determine whether the appellant's whistleblowing was a contributing factor in the action taken against him, and if so, whether the agency had shown by clear and convincing evidence that it would have taken the same action in the absence of the retaliatory factor. *Id.* at 98-99.

On remand, the administrative judge found that the agency had retaliated against the appellant because of his whistleblowing activities and ordered the appellant reinstated to his position. 71 M.S.P.R. at 610. The agency filed a petition for review, the appellant filed a cross petition for review, and OPM sought to intervene, arguing on behalf of the agency that the Board had erred in determining that the appellant's disclosures were protected by the WPA. In *White II*, the Board denied the agency's petition and the appellant's cross petition. *Id.* at 611-16. The Board also found that OPM did not meet the statutory requirements for intervention because it did not seek to intervene as early in the proceeding as practicable, as required under 5 U.S.C. § 7701(d)(1) and 5 C.F.R. § 1201.114(g)(1), and thus did not address the merits of OPM's arguments. *Id.* at 616-18. The Board, therefore, affirmed the initial decision, and ordered corrective action. *Id.* at 618.

OPM then filed a petition for review of the Board's final decision with the U.S. Court of Appeals for the Federal Circuit, arguing that the Board erred in finding that it had not timely intervened. While this matter was pending, the Board requested that the court remand the case to it for the purpose of deeming OPM's

intervention timely, and considering its arguments on the jurisdictional issue of whether the appellant's disclosures were protected whistleblowing. The court has granted this motion, and we, therefore, now address the merits of OPM's assertions.

OPM contends that the Board used an incorrect legal standard in *White I*, to conclude that the appellant's disclosures were protected under the WPA because he reasonably believed that he disclosed information that evidenced gross mismanagement. OPM asserts that, although the Board correctly stated that the test for whether a putative whistleblower has a reasonable belief in the disclosure is an objective one, it improperly applied a subjective test in concluding that the appellant met the requirements of the statute. OPM argues that the Board improperly made the appellant's subjective "fear" of a substantial loss of educational services the "touchstone" of its analysis, and that the emotion of "fear" cannot constitute a rational ground or motive, or a logical defense for the appellant's actions. OPM also asserts that the Board improperly relied upon the widespread sharing of the appellant's belief by educational institutions and other ESOs to support its conclusion that the appellant reasonably believed he was disclosing gross mismanagement. OPM argues that a shared belief, by itself, is insufficient to determine reasonableness because the others' beliefs may also be unreasonable, and the proper analysis must, therefore, examine whether there was a rational basis for the shared belief.

ANALYSIS

We disagree with OPM's claim that we made the subjective emotion of "fear" the "touchstone" of our conclusion in *White I* that the appellant's disclosures were protected under the WPA, and we instead find that OPM has taken out of context the isolated use of the word "fear." As OPM avers, our decision in *White I* includes the statement that the "appellant's 'fears' that there might be a substantial loss of educational services and that the standards might be unworkable" supported the conclusion that he reasonably believed he was disclosing gross mismanagement. 63 M.S.P.R. at 96. We further recognize that the word "fear" generally means a distressing emotion aroused by impending pain, danger or peril. Random House College Dictionary 482-83 (Revised ed.1975).

A fair reading of *White I*, however, reveals that the Board's use of the word "fear" was meant in the context of the appellant's "beliefs" and "concerns" and of the underlying reasons for his opinion. Indeed that decision is replete with references to the appellant's "belief" and "concern" that the QES would cause loss of educational services on a nationwide basis. The Board stated that the "record contains evidence of substantial support for the appellant's 'concerns' regarding the agency's actions in implementing QES and its requirements that colleges and universities adhere to what the appellant 'believed' were unworkable and untenable quality education standards," and noted that the appellant expressed his "concerns" in two meetings. 63 M.S.P.R. at 95-96. Indeed, the very paragraph mentioning the appellant's "fear," also states that the appellant's "concerns" were shared by a wide variety of education

institutions and other ESOs. *Id.* at 96. Thus, contrary to OPM's claim, a complete review of *White I* establishes that the Board's conclusion was based upon the appellant's "belief," which is an opinion or conviction, and "concern," which is a matter that engages a person's attention, interest, or care, and not upon the subjective emotion of "fear." Random House College Dictionary 123, 278 (Revised ed. 1975). Moreover, to the extent that our use of the word "fear" encompasses the emotional context of that word, our decision makes clear that the appellant's "fear" was reasonable, as required under the WPA, based upon his knowledge of the QES, and the shared beliefs of other ESOs and educational institutions. 63 M.S.P.R. at 95-96.

OPM's argument that the objective test for determining whether an appellant has a reasonable belief that his disclosure evidences a matter covered by the WPA cannot be satisfied merely because others share the belief, is also without merit. Since *White I*, the Board has reiterated the manner in which an employee may establish that his belief was reasonable. The Board has stated that an appellant may meet this test by showing that he was familiar with the alleged improper activities and that his belief was shared by other similarly situated employees. *See Schlosser v. Department of the Interior*, 75 M.S.P.R. 15, 20-21 (1997); *Scott v. Department of Justice*, 69 M.S.P.R. 211, 237-38 (1995), *aff'd* 99 F.3d 1160 (Fed.Cir. 1996) (Table).

Again, a review of *White I* shows that the Board properly applied this standard. There was no question regarding the appellant's familiarity with QES because he was an ESO and the agency initiated the appellant's detail because it lost confidence in his ability to support

that program. 63 M.S.P.R. at 93. The Board also recognized that other ESOs shared the appellant's opinion, and cited specific evidence supporting this conclusion. *Id.* at 96. Thus, the Board correctly based its determination on the appellant's description of his disclosures, including his familiarity with QES, and on documentary evidence showing that there was widespread sharing of his views, including similar views by similarly situated ESO employees. *Id.* at 95-96. We, therefore, conclude that OPM's arguments, including its assertion that the Board failed to consider alleged bias against the QES by colleges and universities, improperly focus on isolated aspects of our decision while overlooking the cumulative effect of the basis for our decision. As such, OPM's arguments do not provide a basis for disturbing our prior decisions in this appeal.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

For the Board:
ROBERT E. TAYLOR,
WASHINGTON, D.C.

(3)

No. 99-629

Supreme Court, U.S.
FILED
JAN 10 2000
CLERK

In The

Supreme Court of the United States

JOHN E. WHITE,

Petitioner,

v.

JANICE R. LACHANCE, DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF AMICI CURIAE GOVERNMENT ACCOUNTABILITY PROJECT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, FUND FOR CONSTITUTIONAL GOVERNMENT, NATIONAL ASSOCIATION OF TREASURY AGENTS AND PROJECT ON GOVERNMENT OVERSIGHT IN SUPPORT OF PETITIONER

JOANNE ROYCE
(*Counsel of Record*)
THOMAS M. DEVINE
Government Accountability Project
1612 K Street, NW, Suite 400
Washington, D.C. 20006
(202) 408-0034

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

24/00

QUESTION PRESENTED

Does the Whistleblower Protection Act of 1989 require federal employees who expose governmental fraud, waste and abuse to establish the alleged government misconduct by "irrefragable" proof in order to qualify for relief under the Act?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THE FEDERAL CIRCUIT ERRED BY CREATING AN UNREALISTIC STANDARD FOR PROTECTION UNDER THE WHISTLEBLOWER ACT 6

II. THE COURT BELOW ERRED BY CREATING LOOPHOLES IN THE WHISTLEBLOWER PROTECTION ACT CONCERNING "ANY" DISCLOSURE OF SPECIFIED GOVERNMENT MISCONDUCT 13

III. THE COURT ERRED BY SUBJECTING WHISTLEBLOWERS TO A PERSONAL BIAS INQUIRY AS A PREREQUISITE TO RELIEF AGAINST RETALIATION 16

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Fiorillo v. Dept. of Justice, 795 F.2d 1544 (1986)....13, 16

Geyer v. Dept. of Justice, 63 M.S.P.R. 13 (1994)..... 12

Ramos v. F.A.A., 4 M.S.P.R. 388 (1980) 4, 12

Russell v. Department of Justice, 76 M.S.P.R. 317 (1997) 17

Scott v. Dept. of Justice, 69 M.S.P.R. 211 (1995) 12

SEC v. Joiner, U.S. 320 U.S. 344 (1943)..... 7

Serrao v. Merit Systems Protection Board, 95 F.3d 1569 (Fed. Cir. 1996)..... 16

White v. Lachance, 174 F.3d 1378 (Fed. Cir. 1999) ....*passim*

Willis v. Dept. of Justice, 141 F.3d 1139 (Fed. Cir. 1998)..... 16

STATUTES

Act of October 29, 1994, Pub. L. No. 103-424, 108 Stat. 4361 (1994)..... 10

Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 111 (codified in scattered sections of 5 U.S.C. (Supp. IV 1980))..... 7

Standards of Ethical Conduct of Employees of the Executive Branch, 5 C.F.R. Part 2635 (1998) 5, 16

Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) 1, 11

5 U.S.C. § 2302 (b)(8)..... 4, 6, 7

5 U.S.C. § 2302 (a)(2)(xi)..... 17

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIALS

134 CONG. REC. 29,544 (1988) 9

134 CONG. REC. 27,856 (1988) 9

134 CONG. REC. 19,981 (1988) 14

135 CONG. REC. 4,535 (1989) 9

135 CONG. REC. 5,032-33 (1989) 11

140 CONG. REC. 29,353 (1994) 15, 17

145 CONG. REC. S11445 (Daily ed., Sept, 24, 1999) 6

H.R. REP. No. 769, 103rd Cong., 2d Sess. 12 (1994) 10

H.R. REP. No. 769, 103rd Cong., 2d Sess. 15 (1994) 17

H.R. REP. No. 769, 103rd Cong., 2d Sess. 17 (1994) 14

H.R. REP. No. 769, 103rd Cong., 2d Sess. 18 (1994) 15

Markup Meetings on H.R.11280 of the House Comm. on Post Office and Civil Service, 95th Cong., 2d Sess. 22 (1978) 8

S. REP. No. 969, 95th Cong., 2d Sess. 8 (1978) 8

S. REP. No. 413, 100th Cong., 2d Sess. 13 (1988) ..11, 13

S. REP. No. 358, 103rd Cong., 1st Sess. 2-3 (1994) 10

S. REP. No. 358, 103rd Cong., 1st Sess. 10 (1994)..... 17

TABLE OF AUTHORITIES – Continued

Page

The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Government Waste, Abuse and Corruption Prepared for the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess. 42-44 (1978) 8

OTHER AUTHORITIES

24 *Weekly Compilation of Presidential Documents*, pp. 1377-78 (1988): October 26, 1988, "Memorandum of Disapproval for the Whistleblower Protection Act of 1988." 9

Thomas M. Devine, *The Whistleblower's Survival Guide: Courage Without Martyrdom* (1997) 1

Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L.REV. 531 (1999) 1

Robert G. Vaughn, *Statutory Protection of Whistleblowers in the Federal Executive Branch*, 1982 U. ILL. L.REV. 615 9

Sutherland, *Statutory Construction*, sections 363, 390, 393, 395 (2d ed. 1904) 12

Webster's Deluxe Unabridged Dictionary 970 (Simon and Schuster, 1979) 12

25 *Weekly Compilation of Presidential Documents*, pp. 515-517 (1989): April 10, 1989, "Presidential Remarks and Statement on Signing the Whistleblower Protection Act of 1989." 10

BRIEF OF AMICI IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI[1]

The Government Accountability Project ("GAP") is a non-partisan, non-profit public interest law firm specializing in legal advocacy on behalf of "whistleblowers" – government or corporate employees who expose illegality, gross waste and mismanagement; abuse of authority; substantial or specific public health and safety dangers; or other institutional misconduct undermining the public interest.

GAP has expertise in the Act's provisions and implementation, providing oversight for protecting government employees' free speech rights. GAP attorneys have testified before Congress over the last two decades concerning the effectiveness of existing statutory protection, filed numerous *amicus curiae* briefs on constitutional and statutory issues relevant to whistleblowers, and played a leading role in advocating the Whistleblower Protection Act of 1989, P.L. 101-12, 103 Stat. 16 (April 10, 1989) ("WPA"), as well as the WPA's 1994 amendments. GAP has published material concerning the WPA and its practical realities. *See, e.g.*, Thomas M. Devine, *The Whistleblower's Survival Guide: Courage Without Martyrdom* (1997); Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L.REV. 531 (1999).

---

[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or part. No person or entity, other than the *Amici Curiae*, made a monetary contribution to the preparation and submission of this brief.

The American Federation of Government Employees AFL-CIO ("AFGE"), is the national union affiliated with the AFL-CIO which specializes in representing federal employees and is the largest non-postal union representing federal employees. AFGE currently has a membership of almost 200,000, and represents a bargaining unit, almost exclusively federal employees, of almost 600,000. AFGE was instrumental in enactment of the WPA, and its members regularly claim WPA protections.

The Fund for Constitutional Government ("FCG") is a publicly-supported, charitable, non-profit corporation established in 1974 to expose and correct corruption in the federal government through research, public education, and when necessary, legal action. The Fund and its board believe that the country's leaders and decisions should be held to the standards set forth in the Constitution.

The National Association of Treasury Agents ("NATA") is a non-profit, non-partisan legal services and lobbying organization founded in 1977. Formerly incorporated as a Michigan non-profit organization in 1994, membership in NATA, Inc. is limited to active duty, former and retired criminal investigators from the U.S. Department of Treasury and its subordinate law enforcement bureaus and services, including ATF, Customs, Secret Service, IRS, Treasury Inspector General for Tax Administration, and Treasury Office of Inspector General. NATA is staffed exclusively by volunteers, including a nationwide cadre of experienced lawyers who provide many hours of pro bono legal aid to NATA members and their families. Unlike several exclusive private organizations that purport to represent the general interests of law

enforcement officers, NATA is an inclusive organization that welcomes all U.S. Treasury criminal investigators regardless of race, gender and/or ethnic background.

The Project on Government Oversight ("POGO") is a non-partisan, non-profit government watchdog whose mission is to investigate, expose and remedy abuses of power, mismanagement, and government subservience to special interests by the federal government. POGO's methods include networking with government investigators and auditors whose findings have received little government attention, working with whistleblowers inside the system who risk retaliation, and performing independent investigations.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *White v. Lachance*, Docket No. 98-3249, May 14, 1999, 174 F.3d 1378, the Federal Circuit eviscerated the WPA and its amendments. In 1992, the Petitioner, Mr. John White, a GM-13 Supervisory Education Specialist, publicly criticized Air Force changes in a contract education program. As a result, he was detailed to a reduced grade and moved to an out-of-the-way office to a position with no duties. During administrative proceedings over five years, the U.S. Merit Systems Protection Board ("MSPB" or "Board") three times ruled that the WPA protected Mr. White and ordered the Air Force to restore Mr. White to the position he held in 1992. The Board based its rulings concerning whistleblower activities on Mr. White's expertise in the education program and from governmental and non-governmental education experts.

Despite the Board's favorable rulings, the Federal Circuit held that Mr. White's disclosures were not protected by 5 U.S.C. § 2302(b)(8) as information evidencing a ***reasonable belief*** of specified government misconduct. (Emphasis added.) The Circuit Court remanded the case for a fourth round of proceedings after six years of litigation.

In so ruling, the *White* court created a new and heightened burden of proof for federal employees claiming WPA protection. This decision, if left standing, precludes almost all federal employees from protection against retaliatory federal action.

White held that to meet the "reasonable belief" test, whistleblowers must first overcome a:

> . . . presumption that public officers perform their duties correctly, fairly, in good faith and in accordance with the law and governing regulations . . . unless there is "irrefragable proof to the contrary."

(Petitioner's Appendix ("*Appendix*") at 8). This standard creates a very high initial hurdle to claim eligibility under the WPA and its prohibition against retaliation. This new and statutorily unsupportable test overrules nineteen years of Board precedent holding it unnecessary for an employee to "demonstrate" actual misconduct for WPA protection. *Ramos v. F.A.A.*, 4 M.S.P.R. 388 (1980).

In addition, this decision sends a message to federal government employees that their loyalty is not to the public, but to their superiors – to protect their jobs.

(*Appendix* at 8). This seriously undermines the government employees' code of ethics which provides the foundation for good government in the federal sector. 5 C.F.R. Part 2635 (1998) (Standards of Ethical Conduct for Employees of the Executive Branch). *White* also disqualifies challenges to illegal or otherwise improper "policy." *Id.* These evidentiary hurdles have no statutory foundations or Congressional approval.

Perhaps most chilling, *White* condoned government investigations against whistleblowers seeking the WPA's protection. Such investigations are illegal in cases of First Amendment protected speech. Also insidious is instruction to the Board to consider evidence of "the employee's personal bias or self-interestedness [sic] in the matter." *Appendix* at 8. The Federal Circuit devised this instruction in *White*. Again, the WPA does not require conflict of interest evidence, and doing so defies repeated Congressional dismissal of motive as irrelevant. Under the WPA, what counts is the information's significance for taxpayers.

In a September 24, 1999, floor speech, Senator Charles Grassley of Iowa warned the Senate that harassment against government whistleblowers was intensifying:

> This trend threatens Congress' right to know, and preserves secrecy that shields bureaucratic misconduct. . . . How did we get here?

In Senator Grassley's view one of the major problems has been the judicial activism of the Federal Circuit – grossly misinterpreting federal laws against retaliatory acts. 145

CONG. REC. S11445 (Daily ed., Sept, 24, 1999). Senator Grassley specifically referred to the:

> . . . most extreme Federal Circuit precedent, involving Air Force whistleblower John White. The precedent functionally could cancel both the whistleblower law and the Code of Ethics.

Id.

The *White* decision is only the latest in a pattern of Federal Circuit judicial activism that over a decade has eroded public servants' right to challenge governmental bureaucratic abuses. The Federal Circuit is the only court which reviews Board decisions under the WPA. This Court must accept and overturn this case to stem the Federal Circuit's inexplicable dismantling of the WPA. Finally, this Court must also require the Federal Circuit to apply a strict statutory construction.

ARGUMENT

I. THE FEDERAL CIRCUIT ERRED BY CREATING AN UNREALISTIC STANDARD FOR PROTECTION UNDER THE WHISTLEBLOWER ACT.

By mandating that federal employees meet an "irrefragable proof" rather than a "reasonable belief" test for disclosures to qualify for protection under 5 U.S.C. § 2302(b)(8), the Federal Circuit undercut an overwhelming Congressional mandate for strong employment protection of whistleblowers. The Federal Circuit's activism violated the long established doctrine that:

> . . . courts will construe the details of an Act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.

SEC v. Joiner, 320 U.S. 344, 350-51 (1943).

No serious debate exists concerning the legislative policy and history behind 5 U.S.C. § 2302(b)(8), the statutory whistleblower defense in both the Civil Service Reform Act of 1978 (the "Reform Act") and the Whistleblower Protection Act of 1989. Since passage of the Reform Act, an increasing legislative consensus exists that protection of legitimate government whistleblowers is necessary to challenge illegality, fraud, waste, mismanagement, abuse of authority or public safety threats involving federal programs and activities. Congress highlighted whistleblower protection in the 1978 law as one of the Reform Act's most visible, significant features.

Prior to passage of the Reform Act, a massive congressional study prepared under Senator Patrick Leahy of Vermont concluded:

> The code of silence thwarts top management's ability to effectively manage and actually removes the burden of accountability from their shoulders. Fear of reprisal renders intra-agency communications a sham and compromises not only the employee, management and the Code of Ethics, but also the Constitutional function of congressional oversight itself.

The Whistleblowers: A Report on Federal Employees who Disclose Acts of Government Waste, Abuse and Corruption Prepared for the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess. 42-44 (1978).

During the House markup of the legislation, Rep. Patricia Schroeder of Colorado discussed the budgetary significance of subsequently-approved amendments strengthening whistleblower protections in the bill:

> I think that the potential savings that an amendment like this might incur to the taxpayers is phenomenal. . . . [I]n the long run, we are going to find that this is one of the most cost-saving amendments we could adopt.

Markup Meetings on H.R. 11280 of the House Comm. on Post Office and Civil Service, 95th Cong., 2d Sess. 22 (1978).

The Senate Report accompanying the legislation reaffirmed Rep. Schroeder's observations:

> What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear power plants.

S. Rep. No. 969, 95th Cong., 2d Sess. 8 (1978).

As one commentator noted:

> The ideological breadth of the coalition supporting whistleblower protection indicates that the passage of these provisions is a strong congressional statement in support of the legitimacy of whistleblowing.

Vaughn, *Statutory Protection of Whistleblowers in the Federal Executive Branch*, 1982 U. ILL. L.REV. 615, 619-620.

Passage of the Whistleblower Protection Act of 1989 strengthened this mandate. While Congress seldom passes any significant legislation unanimously, due to a pocket veto, this law received unanimous approval twice in the House in just over five months, with an earlier unanimous approval in the Senate. 134 CONG. REC. 27,856 (1988); 134 CONG. REC. 29,544 (1988); 135 CONG. REC. 4,535 (1989).

Speaking in favor of the new legislation in his floor statement, Senator William Roth of Delaware expressed frustration with the "massive and perplexing problem of Government waste and fraud. . . . " He added the problem would remain unsolved unless civil service employees "exercise their civic duty and report any wrongdoing they see in the workplace." As he warned, however:

> [W]e are fooling ourselves if we believe this can occur without having adequate protections in place that will protect those employees who risk their jobs and career to expose the problems of waste and fraud in Government."

134 CONG. REC. 29,544 (1988).

When President Reagan vetoed the Whistleblower Protection Act of 1988, S. 508, he claimed support for the concept, but raised Constitutional objections to the legislation's technical provisions. 24 *Weekly Compilation of Presidential Documents*, p. 1377-78 (1988): October 26, 1988 "Memorandum of Disapproval for the Whistleblower Protection Act of 1988." President George Bush, however,

affirmed the importance of whistleblowers for ensuring government accountability when he signed the Whistleblower Protection Act of 1989. 25 *Weekly Compilation of Presidential Documents*, pp. 515-517 (1989): April 10, 1989, "Presidential Remarks and Statement on Signing the Whistleblower Protection Act of 1989."

The mandate further intensified with the 1994 amendments strengthening employee rights under the WPA. Act of Oct. 29, 1994, Pub. L. No. 103-424, 108 Stat. 4361 (1994). Congress acted for a fundamental reason – the original law had failed. As the House Post Office and Civil Service Committee explained:

> Unfortunately, while the Whistleblower Protection Act is the strongest free speech law that exists on paper, it has been a counterproductive disaster in practice. The WPA has created new reprisal victims at a faster pace than it is protecting them.

H.R. REP. No. 769, 103rd Cong., 2d Sess. 12 (1994). The House Report referenced an MSPB survey finding:

> . . . that, by a 60-23 margin, employees do not believe their rights will help them, and fear of reprisal remains as strong a reason why would-be employees remain silent as in 1983.

Id., at 13, citing MSPB: Office of Policy Evaluation, Merit Systems Protection Board, *Whistleblowing in the Federal Government: An Update* (1993). *See also*, S. REP. No. 358, 103rd Cong., 1st Sess. 2-3 (1994).

The Senate referenced a General Accounting Office ("GAO") study and emphasized MSPB survey findings that only:

> . . . [h]alf of the employees who witnessed such illegal or wasteful acts said they had reported it.

Id. at 3.

The strongest warning from Congress appeared in the Senate report accompanying initial passage of the Act:

> The Committee intends that disclosures be encouraged. The [O]ffice of the Special Counsel (OSC), the Board and ***the courts*** should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing."

S. REP. No. 413, 100th Cong., 2d Sess. at 13.[2] (Emphasis added).

Despite this crystal-clear legislative intent, the Federal Circuit decreed in *White* that disclosures cannot meet the "reasonable belief" test unless the whistleblower presents "irrefragable proof" that the suspected government officials failed to act:

> correctly, fairly, in good faith and in accordance with the law and governing regulations. . . .

(*Appendix* at 8) (Citations omitted).

Although the court did not describe the "irrefragable" test, the term's definition proves the Federal Circuit created a virtually insurmountable barrier. Webster's Dictionary defines "irrefragable" as "incapable of being

---

[2] Congress specifically incorporated the exhaustive legislative history of the 1988 bill into that controlling the Whistleblower Protection Act of 1989. 135 CONG. REC. 5032-33 (1989) (Explanatory statement on S. 20).

refuted; unanswerable; incontestable." *Webster's Deluxe Unabridged Dictionary* 970. (Simon and Schuster, 1979). Absent some extraordinary event such as a related confession or conviction for criminal misconduct of these same suspected officials, a whistleblower's hopes of protection are a fantasy.

This new barrier also cannot survive scrutiny under elementary canons of statutory construction. A long-established rule requires courts to give effect to the clear meaning of all words in a statute, absent ambiguous language. Sutherland, *Statutory Construction*, Sections 363, 390, 393, 395 (2d ed. 1904). The "irrefragable" standard replaces the less stringent requirement that a protected disclosure "evidences" a "reasonable belief" with the burden to actually prove the charges. This new barrier overrules nineteen years of MSPB case law holding that a whistleblower need not "demonstrate" or "prove" the alleged misconduct to gain protection under the WPA. *Ramos*, 4 M.S.P.R. at 392; *Geyer v. Dept. of Justice*, 63 M.S.P.R. 13, 17 (1994); *Scott v. Dept. of Justice*, 69 M.S.P.R. 211, 237 (1995). Requiring evidence incapable of being refuted rises above requiring proof beyond a reasonable doubt. After *White*, obtaining a felony conviction requires a lower standard than for a whistleblower's disclosure to qualify for protection.

II. THE COURT BELOW ERRED BY CREATING LOOPHOLES IN THE WHISTLEBLOWER PROTECTION ACT CONCERNING "ANY" DISCLOSURE OF SPECIFIED GOVERNMENT MISCONDUCT.

In *White*, the Federal Circuit defied Congress' decade-long effort to eliminate judicially-imposed loopholes. In the WPA, Congress replaced the Reform Act's statutory language protecting "a" disclosure of significant misconduct to protection for "any" disclosure that otherwise qualifies. This change responded to loopholes the Federal Circuit created in *Fiorillo v. Department of Justice*, 795 F.2d 1544 (1986). There, the court rejected protection for speech unless the whistleblower was the first to disclose misconduct. Otherwise, the disclosure was "stale." *Id.* at 1550. The Federal Circuit also rejected protection absent proof that:

> the primary motivation of the employee [was] to inform the public on matters of public concern, and not personal vindictiveness.

Id. at 1550.

In switching from "a" to "any," Congress specifically cited *Fiorillo*. The Senate Governmental Affairs Committee emphasized the Federal Circuit's inappropriate judicial activism concerning employee motives.

> The court reached this conclusion despite the lack of any indication in CSRA that an employee's motives are supposed to be considered in determining whether a disclosure is protected.

S. REP. No. 413, 100th Cong., 2d Sess. 13 (1988).

As explained in the Senate Report,

> For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or only if the employee is the first to raise the issue. S. 508 emphasizes this point by changing the phrase "a" disclosure to "any" disclosure in the statutory definition.

Id.

In a floor statement prior to the Senate's first unanimous vote approving the Act, Senator Carl Levin unequivocally reaffirmed the purpose of modifying the statutory language was to preclude consideration of:

> . . . such factors as whether the employee was the first person to make the disclosure, whether the disclosure was made to someone other than the responsible agency official, what the motives of the employee may have been in making the disclosure, or other similar factors, in determining whether a disclosure is protected.

134 CONG. REC. 19,981 (1988).

The Federal Circuit did not desist. In the legislative history to the 1994 amendments, Congress sharply noted that further modifications to statutory language were necessary, because:

> . . . [t]he body of case law developed by the Board and Federal Circuit has represented a steady attack on achieving the legislative mandate for effective whistleblower protection.

H.R. REP. No. 769, 103rd Cong., 2d Sess. 17.

Concerning Board-created loopholes, Congress stated:

> Perhaps the most troubling precedents involve the Board's inability to understand that 'any' means 'any.' The WPA protects 'any' disclosure evidencing a reasonable belief of specified misconduct. . . . The only restrictions are for classified information or material the release of which is specifically prohibited by statute. Employees must disclose that type of information through confidential channels to maintain protection; otherwise there are no exceptions.

Id. at 18.

In the only legislative history for the composite amendments, House Civil Service Subcommittee Chairman Pete McCloskey, lead sponsor for the amendments, stated:

> It also is not possible to further clarify the clear statutory language that protection for 'any' whistleblowing disclosure evidencing a reasonable belief of specified misconduct truly means 'any.' A protected disclosure may be made as part of an employee's job duties, may concern policy or individual misconduct, and may be oral or written and to any audience inside or outside the agency, without restriction to time, place, motive or context.

140 CONG. REC. 29,353 (1994)

Nonetheless, in *White* the Federal Circuit restored, created and announced the validity of three loopholes eliminating protection for disclosures that are deemed to be: *(a)* " . . . a weapon in arguments over policy" (*Appendix* at 8); *(b)* motivated by "personal bias or self-interestedness [sic] in the matter" (*id.* at 8); or *(c)* an attack on

the right of loyalty to which "[p]olicymakers and administrators have every right to expect" from subordinates. (*Id.* at 6). As to the last disqualification, federal employees must now proceed at their own risk to honor the Standards of Ethical Conduct to

> disclose wase, fraud, abuse, and corruption to appropriate authorities.

5 C.F.R. Part 2635 (1998).[3]

III. THE COURT ERRED BY SUBJECTING WHISTLEBLOWERS TO A PERSONAL BIAS INQUIRY AS A PREREQUISITE TO RELIEF AGAINST RETALIATION.

The Federal Circuit proved it is out of conformance with the letter and spirit of the WPA when it instructed the Board to seek evidence of " . . . personal bias or self-interestedness [sic] in the matter," by " . . . the putative whistleblower and his similarly situated supporters. . . . " (*Appendix* at 8). This directive reinstitutes the congressionally rejected *Fiorillo* doctrine of examining personal motives irrelevant to public policy concerns. Also, by extending this to the whistleblower's supporters, the court fosters isolating whistleblowers.

---

[3] The *White* loopholes are only the latest salvo in an intensifying Federal Circuit pattern and practice to transform "any" into "almost none." *See, e.g., Willis v. Department of Agriculture*, 141 F.3d 1139, 1144 (Fed. Cir. 1998) (WPA does not cover otherwise protected disclosures made as part of an employee's job duties); *Serrao v. Merit Systems Protection Board*, 95 F.3d 1569, 1576 (Fed. Cir. 1996) (protection is unavailable for whistleblowing disclosures made in the context of a personnel grievance).

The Federal Circuit institutionalizes a personnel practice prohibited since the 1994 amendments. The legislative history of a new personnel action, 5 U.S.C. § 2302(a)(2)(xi) bans:

> any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system. . . .

140 CONG. REC. 29,353 (1994). The WPA was amended to cover:

> any action taken to discriminate or retaliate against a whistleblower because of his/her protected conduct, regardless of what form it may take.

S. REP. No. 358, 103rd Cong., 1st Sess. 10 (1994). Representative McCloskey's floor statement introducing the final consensus bill emphasized that:

> the techniques to harass a whistleblower are limited only by the imagination.

Id.

Retaliatory investigations against the whistleblower are a means to discount the disclosure. Rep. McCloskey specifically identified retaliatory investigations as one of the prohibited forms of harassment. 140 CONG. REC. 29,353 (1994); *see also* H.R. REP. No. 769, 103rd Cong., 2d Sess. 15. The Board has honored the new prohibition by outlawing retaliatory investigations. *Russell v. Department of Justice*, 76 M.S.P.R. 317, 323-24 (1997).

Ignoring this legislative history and Board case law, the Federal Circuit has resurrected retaliatory investigations for whistleblowers and supporting witnesses. As

with the above rulings, *White's* investigative requirement frustrates the Whistleblower Protection Act's Congressional mandate and transforms the law into a vehicle that facilitates secrecy instead of fostering Congressional will and the public's right to know about abuses in the federal government.

CONCLUSION

For the above reasons, this Court should grant the petition.

JOANNE ROYCE
(*Counsel of Record*)
THOMAS DEVINE
Government Accountability Project
1612 K Street, NW
Washington, D.C. 20006
(202) 408-0034
Attorneys for Amici

January 12, 2000